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Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1099

FRANCO C. ROBINSON,

Petitioner,

versus

STEAMSHIP "ATLANTIC STARLING"
and
ATLANTIC STARLING STEAMSHIP CORP.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The following brief is submitted by respondents, the S/S "ATLANTIC STARLING" and the Atlantic Starl-

ing Steamship Corporation in opposition to the application for writ of certiorari filed by petitioner, Franco C. Robinson.

QUESTIONS PRESENTED.

Respondents submit that the "Questions Presented" by petitioner are improper in that they contain factual allegations not proven by the evidence and omit vital facts found by the District Court and which form the basis of the judgment in the District Court, which was affirmed by the Court of Appeals for the Fifth Circuit. Specifically, the record is devoid of any factual evidence that the seaman referred to (Carlos Contreras) ever threatened to stab a fellow crew member or refused to obey a lawful command of his superiors.

The only question presented by the case is a *factual* question, not a legal one, and is presented by respondents as follows:

1) Was Carlos Contreras a seaman equal in disposition and seamanship to the ordinary men in the calling or did his presence as a member of the crew of the S/S "ATLANTIC STARLING" render the vessel unseaworthy?

STATEMENT OF THE CASE.

The statement of the case furnished by petitioner is likewise inadequate in that it does not contain "the facts material to the consideration of the questions

presented", as required by Rule 23, Section 1 (e) of the U.S. Supreme Court Rules. Respondents, therefore, present the following statement of facts:

On December 29, 1960, petitioner, master of the vessel, the S/S "ATLANTIC STARLING" was stabbed by the officers' mess man, Carlos Contreras, as a result of an altercation between petitioner and said Carlos Contreras.

Petitioner sued the vessel *in rem* and his employer, the owner, *in personam,* to recover damages for an alleged breach of the warranty of seaworthiness, alleging that the presence of said Carlos Contreras rendered the vessel unseaworthy.

The facts leading to the altercation between petitioner and Carlos Contreras are succinctly stated by the Trial Court in its Findings of Fact (Appendix B, pp. 13-15 of petitioner's brief), which findings are fully supported by the evidence.

> During the voyage libellant carried a loaded revolver on his person at all times, cursed the members of the crew frequently, served the crew inedible and inadequate meals, accused the crew of various illegal acts, withheld money from them at various ports, sailed on several occasions, leaving crew members stranded in foreign ports, and had crew members arrested while in port on liberty, all without just cause.

Libellant went so far as to physically abuse members of the crew and longshoremen brought aboard the vessel to work.

Libellant was particularly abusive to the officer's mess man, Carlos Contreras, frequently cursing and abusing him and referring to him as a "dog", "Chilean Red" and "Communist dog". He cancelled Contreras' allotment and denied him liberty in port.

These acts of provocation and cruel and inhuman treatment continued during the entire voyage, culminating in an altercation between libellant and Carlos Contreras in Iloilo Harbor on December 29, 1960, during the course of which libellant was stabbed.

Following the stabbing, libellant pulled the revolver which he had under his shirt and commenced firing at Contreras, pursuing him to the side of the vessel and firing shots at Contreras as he swam helplessly in the water below.

The record is replete with examples of libellant's complete disregard for the rights and safety of the members of the crew and his frequent abuse and berating of the crew members in general, and Carlos Contreras in particular.

The trial court further found that

Contreras was a quiet, peaceful, efficient seaman, who performed his duties in a competent manner without hesitation or complaint until the goading of libellant's mistreatment caused him to understandably rebel.

Based upon the foregoing factual findings, the trial judge dismissed petitioner's suit. The Court of Appeals affirmed, holding that "the evidence in the record clearly substantiated the findings of the district court concerning the temperament of Contreras." (Appendix A, p. 10 of petitioner's brief.)

ARGUMENT.

The only question presented to the Court is a factual question. It is axiomatic that, ordinarily, this Court will not review the concurrent findings of fact of two courts below. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455 (1944). No reason has been given nor authority cited by petitioner why an exception to this rule should be made in the instant case.

The evidence introduced by respondents showed the following concerning the characteristics and disposition of Carlos Contreras, the man whose presence, petitioner contends, rendered the vessel unseaworthy:

According to Charles John Van Trier, Chief Officer on the S/S "ATLANTIC STARLING", Contreras was a conservative, quiet man, a lover of music. (Dep. Van Trier, Respondents' Exhibit No. 7, pp. 13-14.) "He was a good man, conscientious about his work;

he was well liked among the officers." (Respondents' Exhibit No. 7, p. 14.)

George W. Books, third engineer on the S/S "ATLANTIC STARLING" gave the following description of Contreras (Dep. Books, Respondents' Exhibit No. 4, p. 3):

> "He was a very good waiter because he served all of us at any time we wanted something, he would come around to see what we wanted and it was served as we asked."

p. 4:

> "He was a very congenial person. He could mingle very easily."

Rudolph Sargent, oiler in the engine room aboard the S/S "ATLANTIC STARLING", described Contreras as follows (Dep. Sargent, Respondents' Exhibit No. 6, p. 21):

> "To my opinion one of the best persons you could meet, one of the quietest persons you could meet."

Petitioner, on the other hand, was likened by the Chief Officer, Van Trier, to a veritable "Captain Bligh" (Respondents' Exhibit No. 7, p. 15) who constantly abused the officers and crew members serving aboard the vessel.

Petitioner's only evidence in support of his charge that Contreras was not equal in "temperament and disposition to the ordinary men in the calling" was a forged log entry (attached to Van Trier's deposition, Respondents' Exhibit No. 7) and purportedly signed by Van Trier showing that Contreras had threatened the radio operator. Van Trier denied being present at the time of the alleged occurrence (Respondents' Exhibit No. 7, p. 20) and denied having signed the entry.

The foregoing pertinent portions of the testimony show beyond doubt that the holding of the trial judge to the effect that "Carlos Contreras was a seaman equal in disposition and seamanship to the ordinary men in the calling" was eminently correct.

The second one of petitioners presented questions[1] is equally without merit, as it presupposes that Contreras was "of substandard disposition and temperament", which is not proven by the record. Furthermore, the Court of Appeals did not base its holding in the instant case on the fact that the injured party was a superior rather than a subordinate, as had been the case in *Clevenger v. Star Fish & Oyster Co.*, 325 F. 2d 397 (5th Cir., 1963). Petitioner relied upon the *Clevenger* case, *supra,* in his brief and argument before the Court of Appeals, and said court correctly stated that "the holding of *Clevenger* is not disposi-

[1] "Is the absolute liability of a vessel owner for damages inflicted upon one crewmember by another seaman of substandard disposition and temperament dependent upon whether the victim is the assailant's subordinate or superior?"

tive of the present case" for the reason, inter alia, that in the *Clevenger* case, "unlike the present case, there was no evidence of prior provocation by the libellant." (Appendix A, p. 11 of petitioner's brief.)

Although the opinion of the Court of Appeals in the instant case was not based on the fact that petitioner was the captain of the vessel, the Court did consider his status in distinguishing the fact situation from that in *Clevenger*. Respondents submit that such a distinction is valid for the reason that petitioner as master of the vessel is the managing agent of the owner and endowed with complete authority to confine or discharge a seaman whom he believes to be not equal in disposition and seamanship to the ordinary men in the calling. Consequently, it is obvious that either petitioner breached his obligation to the owner by not confining Contreras or, more likely, petitioner did not consider Contreras to be of dangerous propensities thus warranting confinement. In any event, the evidence completely refutes the charge that Contreras was "of substandard temperament and disposition" and that his presence rendered the vessel unseaworthy.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents.

CERTIFICATE.

I, the undersigned member of the Bar of this Court, hereby certify that I have served a copy of the foregoing brief upon petitioner by mailing same to his counsel of record, Samuel C. Gainsburgh, Esq., 1718 National Bank of Commerce Building, New Orleans, Louisiana, postage prepaid, at New Orleans, Louisiana, this ... day of March, 1967.

.....

FRANK S. NORMANN.